

# TEXAS LAWYER

October 24, 2011

An **ALM** Publication

## Father and Son Reunion

With Judge T. John Ward's Departure What's Next for the Eastern District's Patent Docket?



T. John Ward (left) and Johnny Ward

DANNY HURLEY

by JOHN COUNCIL  
jcouncil@alm.com

Just as U.S. District Judge T. John Ward of Marshall started thinking about taking senior status, he received a fortuitous telephone call that changed everything for him.

The February call was from a trial lawyer Ward knows better than any other, even though the judge has never seen him argue in court: Ward's son, Johnny, a partner in Longview's Ward & Smith.

"Johnny asked me if I'd like to finish out my career

with him," says Ward.

Ward remembers years ago telling Eastern District of Texas Chief Judge David Folsom that he planned to be on the bench for the rest of his legal career. A judge since 1999, Ward always thought he would take senior status when he turned 68 and enjoy the reduced workload. Few federal judges return to the practice of law, Ward acknowledges.

But after the call from Johnny, the judge was torn. He thought about his son's offer for five months. Then at a federal judges' conference in Washington, D.C., he talked it over with a few other jurists.

"Several of his colleagues said, 'Are you crazy? If you can practice with your son, practice with your son,'" Johnny recalls.

The advice led to Ward's light-bulb moment. "I called Johnny from Washington and said, 'I'm doing this,'" says Ward, who retired from his Eastern District bench on Sept. 30 and joined his son's firm on Oct. 3. "[N]ow I have this opportunity. I guess when you're my age you never say never," he says.

It was Ward who helped transform the Eastern District into an internationally renowned rocket-docket for patent infringement suits. That's because in 2000, he promulgated special rules and procedures intended to speed up the pretrial process for complicated patent cases. A few years later, the entire Eastern District adopted the rules.

But the district has drawn criticism, especially from some defense counsel who believe plaintiffs engage in forum-shopping and file suits there because juries have a plaintiff-friendly reputation.

The Marshall Division, one of six in the Eastern District, also is a victim of its own success. Patent litigants could once get a trial setting 18 months after filing a case, but now that wait can be three years, Ward says.

When Ward implemented the rules in his Marshall courtroom, there were fewer than 20 patent suits pending on his docket; when he left the bench last month there were 241. [See "Eastern District Patent Filings By Division," page 9.]

For 12 years Ward has been a larger-than-life figure in the Eastern District. So it is understandable that news of his departure — as well as the departure of U.S. Magistrate Judge Chad Everingham of Marshall — might rattle some patent lawyers who practice there. Would the double-whammy loss of two of the most patent-savvy judges in the country lead to fewer infringement suits and less business for lawyers who practice in the district?



So far, that hasn't happened. Ward announced he was leaving the bench in September 2010, but the number of infringement suits filed in Marshall has not slowed. In Fiscal Year 2011, which ended Sept. 30, 241 infringement cases were filed in the division. That's as many or more when compared to FY 2010, after false-marking cases are factored out, says Eastern District clerk David Maland. (This year the district reclassified false-marking cases, which no longer are counted as patent infringement suits.)

"I would have thought, in all candor, that the docket would have fallen off, but we're not seeing any indication of that," says Maland, adding that it's still too early to predict. "I think it's clear that the Eastern District is regarded as a favorable venue for patents, even with the departure of Judge Ward and Judge Everingham," he says.

Maland adds that the America Invents Act, which reforms patent litigation, also may ensure the continued flow of new filings. Specifically, the act, which President Barack Obama signed into law on Sept. 16, includes a joinder provision that limits who can be named as a defendant in a multiparty infringement suit. For example, if a plaintiff alleges 10 companies infringed on its patent, the plaintiff must file 10 suits — one against each company — instead of just one suit naming 10 defendants.

"We're going to see more patent cases because they are requiring more cases to be filed," Maland says.

### Continued Growth?

While the judges in a particular district do not have a say in who the White House nominates to fill a judicial vacancy, they do get to decide where a new judge will sit within the district. After Ward notified Obama about his planned retirement, the president nominated Rodney Gilstrap, a partner in Marshall's Smith & Gilstrap, to fill Ward's bench. The Senate Judiciary Committee confirmed Gilstrap's nomination in September, and the full Senate is expected to vote by the end of the year, says U.S. Sen. John Cornyn, R-Texas. The Eastern District judges have voted to have Gilstrap sit in Marshall, even though a bench in the Sherman Division

has remained unfilled since 2006. Gilstrap did not return a telephone call seeking comment.

Since Ward's departure last month, Folsom has been handling pending civil cases in the Marshall Division. "And as soon as Rodney Gilstrap is confirmed, I'll turn them back over to him," Folsom says.

U.S. District Judge Leonard Davis of Tyler, who will become the Eastern District's chief judge in January, says the district's judges have invited jurists from the U.S. Court of Appeals for the Federal Circuit in Washington, D.C., to assist with patent trials in Ward's absence. Judge William Bryson of the Federal Circuit, which hears patent suit appeals, has agreed to preside over trial settings in January and February. Davis adds that U.S. District Judge Michael Schneider of Tyler is handling some patent trial settings in Marshall.

"In the short term, there are so many cases in the pipeline in the Marshall Division it's going to be busy just getting the cases ready for trial," says Andy Tindel, managing attorney of the Tyler office of Provost ★ Umphrey.

Several patent attorneys say they are comfortable with Gilstrap taking over Ward's busy docket. Those who have talked to Gilstrap say he knows what he's getting into.

Gilstrap "said it's going to be business as usual," says Tindel, who attended Baylor University Law School with Gilstrap. "As far as predictability is concerned, I think it's going to be the same."

Michael C. Smith, a partner in the Marshall office of Siebman, Burg, Phillips & Smith, agrees with Tindel. "The most important thing for a judge is temperament. You can get everything else. We've seen Rodney's temperament all we need to over the years. He had the most difficult job in county government, and he handled it gracefully," Smith says, referring to Gilstrap's time as a Harrison County judge. "He doesn't have the trial experience we're used to, but if you've got good judgment, you can get away with that. I'm sleeping at night."

Patent attorneys analyze judges' decisions like baseball managers dissect players' stats. So lawyers will look hard at the opinions of Gilstrap and soon-to-be U.S. Magistrate Judge Roy S. Payne, who replaces Everingham, before making a call on whether to continue filing infringement suits in Marshall, says Steven Geiszler, counsel at the Dallas office of SNR Denton.

Because Gilstrap will inherit such a big docket, he'll have to have the same skill-set as Ward to survive — making quick reads of claim-construction disputes to move the cases forward, Geiszler says.

Other lawyers are banking on the belief the Marshall



DANNY HURLEY

**“The most important thing for a judge is temperament. You can get everything else,” Michael C. Smith says.**



**Gilstrap will inherit a big docket, so he’ll have to have the same skill-set as Ward to survive, says Steven Geiszler, above.**



GITTINGS

**“If we didn’t think there was oil there, we wouldn’t have put up an oil rig,” says Steven Zager of Akin Gump.**

Division’s patent docket will continue to grow. Steven Zager, a partner in Akin Gump Strauss Hauer & Feld’s New York office, hired Everingham to open an office for the firm in Longview, located less than 30 minutes away from Marshall.

“You’ve got a lot of really fine trial lawyers who live there [in the Eastern District], and they’re going to be filing in their own backyard,” says Zager, who leads Akin Gump’s global intellectual property practice. “If we didn’t think there was oil there, we wouldn’t have put up an oil rig.”

### The Future

As the Marshall Division prepares for life without Ward as a judge, he is planning his life in private practice.

“He’s asked me, ‘What am I going to do?’” Johnny Ward says of his father. “I’ve told him, ‘Whatever you want to do.’ He’s going to be covered up with calls. . . . He’s going to have to be selective about what he does.”

With his dad no longer on the bench, Johnny now can file suits in the Marshall Division. But as an attorney, former Judge Ward cannot represent clients in litigation filed in the Eastern District for one year. That’s because when Ward announced he was considering leaving the bench, the Eastern District judges created a new local rule that

prevents former judges from practicing in the district for a year after their departure.

As a result, Johnny says his dad will probably handle commercial disputes in state court and travel the country as a mediator until October 2012. Ward leads the firm’s new mediation practice.

Within days of joining Ward & Smith, the former judge says he signed up two of clients, but “no intellectual property stuff.”

After the year is up, Ward says he’ll likely handle a patent case in the Eastern District with his son — on one condition. “I’ve told Johnny I want him to be the lead,” Ward says. “I don’t want the responsibility.”

Johnny’s just glad his dad decided to join his firm and may have more free time now that he’s not handling one of the nation’s busiest patent dockets. Perhaps they’ll resume a hobby they both enjoy.

“I play harder than he does,” Johnny says of his dad. “He’s always covered up with work. I hope to take him bird hunting.”

Ward says his job at the firm is going well, joking, “I haven’t been fired.” He adds, “The best job in the world I ever thought of was being a U.S. District Court judge. And I still think that, except for practicing law with your son.” 